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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVEN BENHAYON,

Plaintiff,

v.

ROYAL BANK OF CANADA, a Canadian company, business form unknown; RBC WEALTH MANAGEMENT COMPANY, formerly RBC DAIN RAUSCHER, INC., business form unknown; THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN, formerly known as RBC Dain Rauscher Wealth Accumulation Plan; and, DOES 1 through 20,

Defendants.

Case No. CV08-06090 FMC(AGRx)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR BENEFITS UNDER THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN

Date: not applicable
Time: not applicable
DJ: Florence-Marie Cooper
Courtroom: (Roybal) 750
MJ: Alicia G. Rosenberg
Courtroom: (Spring) 23

Trial Date: February 16, 2010

Exhibit 2

Plaintiff's Supp. Exh. 31

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I. INTRODUCTION

Plaintiff Steven Benhayon's ("Plaintiff") Opening Brief Re: 1) Non-Applicability Of ERISA's Top Hat Exemption To The U.S. Wealth Accumulation Plan; And 2) Defendants' Execution Of The U.S. Wealth Accumulation Plan In Bad Faith ("Opening Brief") fails to establish any claim under ERISA. For the reasons set forth in Defendants' Memorandum of Points and Authorities In Support Of Its Motion For Partial Summary Judgment, and as amplified herein, there is no genuine dispute with respect to any material fact relating to Plaintiff's claim for benefits under the Royal Bank of Canada US Wealth Accumulation Plan (the "WAP" or the "Plan") and Defendants are entitled to judgment on this claim as a matter of law. Plaintiff has not, and cannot, establish that the WAP's Plan Administrator, the WAP Committee, abused its discretion in denying his claim for benefits.

It is undisputed that Plaintiff received a distribution of $1,161,876.79 from the WAP shortly before he was terminated in connection with a reduction in force and that the only amounts which remained credited to his WAP account at termination represented unvested employer contributions. Plaintiff's argument that the WAP is not a "top hat" plan is irrelevant to whether Plaintiff is entitled to benefits under the Plan. The only relevance of top hat status is that it exempts the plan from ERISA's minimum vesting provisions. However, Plaintiff has not alleged in his complaint or Opening Brief that the WAP violates ERISA's minimum vesting provisions.

Even if this status were relevant, the WAP satisfies the requirements of a top hat plan. As such, even if subject to ERISA, it is exempt from many of the requirements imposed ERISA plans, including but not limited to the vesting, participation, and fiduciary mandates. For these reasons, as described more fully below, Defendants should be granted summary judgment on Plaintiff's claim for benefits under the WAP.

II. FACTUAL BACKGROUND

The factual background underlying this case, including Plaintiff's employment and participation history in the WAP and the relevant provisions of the WAP Plan Document are set forth at pages 2 through 8 of Defendants' Memorandum of Points and Authorities filed on July 22, 2009. In the interest of brevity, those passages are incorporated by reference as if fully set forth herein.

III. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment should be granted where "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Plaintiff does not dispute that entry of summary judgment is appropriate in this case. As set forth in Defendants' Memorandum In Support Of Its Motion for Partial Summary Judgment, and as amplified herein, entry of judgment in favor of Defendants and against Plaintiff is appropriate with respect to Plaintiff's claim for benefits under the WAP.

IV. ARGUMENT

A. The WAP's Status as a Top Hat Plan is Irrelevant to Plaintiff's Claim for Benefits.

Plaintiff's only reference to the potential relevance of the WAP's status as a top hat plan is found at page 7 of his Opening Brief where he asserts that non-top hat plans are subject to "a stringent set of statutory rules and attendant fiduciary duties under ERISA." However, he does not identify which, if any, of those rules or duties were allegedly violated or implicated in the denial of Plaintiff's request for benefits, much less establish that the rule allegedly violated is one to which non-top hat plans are subject while top hat plans are not. Top hat plans are exempt only from ERISA's participation, vesting, funding, and fiduciary provisions. *Demery v. Extebank Deferred Comp. Plan (B)*, 216 F.3d 283, 287 (2d Cir. 2000) (citing 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1)). The only such issue even indirectly alleged by Plaintiff is that he is entitled to benefits that had not yet vested as of the date of his

termination. However, he does not allege in his complaint, or argue in his Opening Brief, that the WAP violates ERISA's minimum vesting provisions. Absent such an argument, whether the WAP is a top hat plan bears no relevance to his claims, and there is no need for the Court to decide this issue.

B. The WAP Satisfies The Requirements Of A Top Hat Plan.

Even if the WAP's status as a top hat plan were relevant, Plaintiff's argument fails because the WAP meets the requirements of a top hat plan. ERISA defines a top hat plan as a plan that is "unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). Top hat plans are exempt from ERISA's participation, vesting, funding, and fiduciary provisions. *Demery*, 216 F.3d at (citing 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1)). Plaintiff advances a number of arguments he claims warrant a finding that the WAP did not qualify as a top hat plan. The undisputed facts, and the applicable law, however, foreclose his contention.

1. The WAP Limits Participation to a Select Group.

Plaintiff contends that the WAP is not a top hat plan, because (as Dain Rauscher represented to the Department of Labor when submitting the WAP's top hat exemption notice), approximately 1200 employees were participating in the WAP, which is more than the number permissible to constitute a "select group." Opening Brief at 2. This argument is devoid of factual or legal support.

Initially, *Duggan v. Hobbs*, the very case on which Plaintiff relies, makes clear that the relevant test is not *how many* employees participate in the plan but whether eligibility "is limited to a small *percentage* of the employer's entire work force." *Duggan v. Hobbs*, 99 F.3d 307, 312 (9th Cir. 1996) (emphasis added). Moreover, "there is no existing authority that establishes when a plan is too large to be deemed select." *Alexander v. Brigham and Women's Physician's Organization, Inc.*, 467 F. Supp. 2d 136, 143 (D. Mass. 2006) (internal quotation marks omitted) *aff'd* 513 F.3d

37 (1st Cir. 2008). Plaintiff's only authority on the issue is *Darden v. Nationwide Mut. Ins. Co.*, a district court opinion which merely holds that a group comprising 18.7% of the employer's total workforce was too large to be considered "select" for purposes of the top hat exemption. *Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 397 (E.D.N.C. 1989) *aff'd* 922 F.2d 203 (4th Cir. 1991) *rev'd on other grounds*, 503 U.S. 318 (1992). However, the Second Circuit subsequently held that a plan which covered 15.34% was not too broad to qualify as a top hat plan, so long as the other requirements of the test were satisfied. *Demery*, 216 F.3d at 289. The *Demery* court distinguished *Darden* on the grounds that the group there was both larger and not limited to management or highly compensated employees. Specifically, in *Darden*, the average income of participating employees was comparable to that of other employees in the company at large. *Id.* at 288.

Plaintiff has not made any showing regarding the *percentage* of RBC's employees who are eligible to participate in the WAP, other than her argument that it must be more than one percent of the company's workforce. Opening Brief at 14:23-15:3. The argument is both speculative and irrelevant, since numerous courts have found the "select group" requirement satisfied by much larger groups. *See, e.g., Alexander v. Brigham and Women's Physician's Organization, Inc.*, 513 F.3d 37, 46 (1st Cir. 2008) (8.7% of company's workforce was a "select group"); *Belka v. Rowe*, 571 F. Supp. 1249, 1252 (D. Md. 1983) (up to 4.6%); *Duggan*, 99 F.3d at 312 (4.3%); *In re Battram*, 214 B.R. 621, 625 (Bankr. C.D. Cal. 1997) (3.1%). In fact, During Plan years 2003 through 2007, only 7.11 to 14.91% of RBC's workforce was eligible to participate in the WAP. [Second Sikich Decl.[1] ¶ 6, p. 1:19-24.] Thus, at all relevant times, the group of WAP-eligible employees was below the threshold which *Demery* found acceptable, and in several years, below the thresholds found

[1] "Second Sikich Decl." refers to the Second Declaration of Gabriela Sikich In Support Of Defendants' Motion For Partial Summary Judgment On Plaintiff's Claim For Benefits Under the Royal Bank of Canada US Wealth Accumulation Plan, filed concurrently herewith.

acceptable in other cases as well. Accordingly, there is no support for Plaintiff's argument that the WAP fails to qualify as a top hat plan because it is not limited to a "select group."

2. The WAP Limits Participation to Management And/Or Highly-Compensated Employees.

Plaintiff further argues that the WAP does not meet the requirements of a top hat plan because participation was not limited to executives, but rather extended to the company's sales force, in his words "the working nuts and bolts of the RBC system." Opening Brief at 17:21-24. Once again, however, Plaintiff misses the mark. A plan qualifies as a top hat plan if it is limited to a select group of "management ***or*** highly compensated employees." 29 U.S.C. § 1051(2) (emphasis added). Where the participants qualify as "highly compensated employees," the positions they hold are irrelevant for determining whether the plan qualifies for top hat status. *See Duggan*, 99 F.3d at 312 (top hat requirements satisfied where plaintiff did not dispute that he was highly compensated); *Alexander*, 513 F.3d at 46 (plan for highest earning surgeons in medical group was top hat plan).

It is beyond reasonable dispute that all of the employees who are (or were) eligible to participate in the WAP were "highly compensated." The average earnings of all WAP-eligible employees from 2003 through 2007 were between $269,156 and $345,307 per year. [Second Sikich Decl. ¶ 7, p. 1:25-27.] Thus, in 2003 through 2007, WAP-eligible employees earned at least 3 times as much as the general workforce of WAP-participating subsidiaries, and in one year, earned 4.5 times as much. Id. ¶ 8, p. 1:28-2:3. Accordingly, WAP-eligible employees were highly compensated. *See Alexander*, 513 F.3d at 46 (plan contributors were highly compensated where they earned five times the income of the workforce); *Demery*, 216 F.3d at 289 (plan-eligible employees were highly compensated where they earned more than twice the average workforce earnings).

The fact that the WAP participants were highly compensated is further supported by the definition of highly compensated taken by the Internal Revenue Service during the relevant time period. *See Belka*, 571 F. Supp. at 1253 (considering IRS standard for "highly compensated" in determining that plan participants were within a "select group"). In 2007, the Internal Revenue Service (IRS) defined the Highly Compensated Employee Limitation ("HCE") under §414(q)(1)(B) of the Internal Revenue Code of 1986 using an earnings threshold of $100,000 per year. See IR-2008-118. The WAP-eligible employees have always easily exceeded this standard.

3. Plaintiff's Assertion that WAP Participants Lacked Bargaining Power is Meritless.

Plaintiff further contends that the WAP fails to qualify as a top hat plan because WAP participants did not have the bargaining power to affect the terms and conditions of the WAP. Open Br. 15:4-18:5. However, nothing in the statutory definition of a top hat plan creates such a requirement. Indeed, Plaintiff's entire argument rests on a single district court opinion from outside this circuit, *Carraba v. Randalls Food Markets, Inc.*, 38 F. Supp. 2d 468 (N.D. Tex. 1999), which, in turn, relies on an opinion letter from the Department of Labor stating *its* views as to Congress' reasons for exempting top hat plans from many of ERISA's requirements.[2] *See Carraba*, 38 F. Supp. 2d at 477. Such opinions hardly provide authoritative grounds to depart from the plain language of the statute and add additional requirements to those enacted by Congress. Not surprisingly, the *Carraba* holding has come under heavy criticism. *See Alexander*, 513 F.3d at 46-48.

[2] Plaintiff incorrectly asserts that *Carraba* "relied heavily on the Ninth Circuit's reasoning in *Duggan*," suggesting that it was nothing more than a logical extension of that opinion. Opening Brief at 15:20-22. In fact, *Carraba* does not even cite to *Duggan*. Moreover, while *Duggan* suggests that a participant's ability to affect the terms and operation of the plan through negotiation may be a relevant factor in determining top hat status, it nowhere holds that such power is required. Indeed, the *Duggan* court had no occasion to reach the issue, as it found that the plaintiff there did have such power. *Duggan*, 99 F.3d at 312-13.

The *Alexander* court rejected *Carraba*'s (and Plaintiff's) position that a plan does not qualify as a top hat plan unless its participants have bargaining power to influence the terms and operation of the plan on multiple grounds. First, the court noted, the DOL opinion letter did not present itself as an interpretation of the relevant statute or purport to define the requirements for top hat status under the statute. *Id.* at 47, 48. Thus, by its own terms, it did not support the conclusion which *Carraba* derived from it. *Id.* Second, neither the language of the statute nor its legislative history "contains the slightest hint that courts would consider employees' ability to bargain over the terms of their deferred compensation plans" in determining top hat status. *Id.* at 48. To the contrary, the tests contained in the statute seemed reasonably designed to effectuate the purpose ascribed to Congress by the opinion letter. *Id.* at 47. For all the reasons, the *Alexander* court declined to follow *Carraba*, as this Court should as well. *Id.* at 47-48

Even if this Court rejects the better-reasoned opinion in *Alexander* and follows *Carraba*, Plaintiff's argument would still fail because he provides no evidence to support his assertion that WAP participants lacked bargaining power, arguing instead that the fact of this lawsuit proves that *he* lacked such bargaining power. However, it could just as easily show that he did have power, but now regrets the deal that he struck. Since he offers no evidence to support his position, Plaintiff's argument should be rejected.

4. The WAP Is Unfunded.

On pages 18 through 20 of his Opening Brief, Plaintiff argues that the WAP is not "unfunded" under ERISA, and that it therefore does not meet the definition of a "top hat plan." The lynchpin of Plaintiff's argument is that, "[a]s the WAP clearly comprises Plaintiff's own contributions, RBC cannot claim that the WAP was completely "unfunded' and thus top hat exempted." Opening Brief at 19. This argument represents a material misrepresentation of the operation of the WAP and a fundamental misunderstanding of the law.

ERISA does not define the circumstances under which a plan is "unfunded." In examining that issue, the concept of funding a plan implies the existence of assets held separately from the general assets of the employer. A plan is unfunded where there is no res (or property) separate from the general assets of the company. *Dependahl v. Falstaff Brewing Co.*, 653 F.2d 1208, 1214 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981). See also *Belka*, 571 F. Supp. at 1251-52; DOL Advisory Op. 81-11A (Jan. 15, 1981). In this case, the undisputed evidence is that the benefits under the WAP are paid from the general assets of the Company. [Sikich Decl.,[3] ¶ 8, Exh. G, pp. 25 & 35-36 (2007 Plan Document §§ 2.4 & 8.2).] Plaintiff has come forward with no evidence whatsoever of the existence of a separate trust that would somehow cause the WAP to be considered funded under ERISA. Plaintiff's assertions to the contrary are meritless.

Furthermore, contrary to the implication Plaintiff asks the Court to draw, Plaintiff did not contribute one red cent of his own money to the WAP. What Plaintiff and other participants did was agree, at a point before they became entitled to payment, to opt to forego the future receipt of a portion of their compensation. [Sikich Decl., ¶ 8, Ex. G, page 25, (2007 WAP Plan Document § 2.2)] While Plaintiff could have taken payment of these amounts, he chose instead to defer receipt until a future date (hence the term "deferred compensation"), subject to a potential return on investment in the interim.

This structure of deferred compensation is a well established model for top hat plans. Top hat plans do not fail to be "unfunded" solely because their terms permit employee-participants to elect to defer percentage of their compensation. DOL Advisory Op. 90-14A (May 8, 1990). Plaintiff's assertion that the WAP is not a top hat plan, because it is not unfunded, based on the fact that some of the balance in the

[3] "Sikich Decl." refers to the Declaration of Gabriela Sikich In Support Of Defendants' Motion For Partial Summary Judgment On Plaintiff's Claim For Benefits Under the Royal Bank of Canada US Wealth Accumulation Plan, filed concurrently with Defendant's moving papers in support of this motion.

participants' accounts is derived from their deferred compensation is simply not the law. Defendants are entitled to judgment as a matter of law on this issue.

C. Plaintiff's Suggestion of a Conflict of Interest is Meritless.

In his Opening Brief, Plaintiff insinuates the existence of some sort of conflict of interest based on the administration of the WAP by the WAP Committee and asserts that, as a result, "there were no checks and balances in place to ensure the just enforcement of the WAP." See Opening Brief at 22-23. However, under ERISA's statutory scheme, the "checks and balances" Plaintiff seeks are provided by the judicial review of administrative determinations regarding benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-09 (1989) (explaining ERISA's remedial provisions, including judicial review of adverse benefit determinations). Thus, Plaintiff's argument that there should be "checks and balances" and RBC's administration scheme is somehow deficient find no support in ERISA or the case law interpreting it.

As explained in Defendant's Memorandum of Points and Authorities in support of this motion, that review is conducted under an abuse of discretion standard where, as here, the plan grants the Plan Administrator discretion to make determinations regarding benefits. Thus, the alleged conflict of interest is relevant only insofar as it might impact the level of deference owed to that decision. *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 968-9 (9th Cir. 2006) In fact, there was no conflict of interest here that would call for heightened scrutiny of the WAP Committee's decision and, even if there was, that decision must still be affirmed because no other interpretation of the WAP Plan provisions is possible.

Plaintiff is mistaken that the individuals who reviewed his claim for benefits or his appeal had conflicting interests. Under the terms of the WAP, Plaintiff's benefits were payable by the Royal Bank of Canada because Plaintiff is a resident of California. [Sikich Decl., ¶ 8 Ex. G, page 35 (2007 WAP Plan Document § 8.2(a)-(b).] However, none the members of the WAP Committee who considered

Plaintiff's claim or appeal were employed by that entity. [Second Sikich Decl. ¶ 9, p. 2:4-13.] Since there was no structural conflict of interest, Plaintiff must point to other facts suggesting that the members of the WAP Committee were anything other than disinterested, which he has not done, or that these conflicting interests influenced their decision-making process. To the contrary, as Defendants have pointed out repeatedly, the decision to deny Plaintiff's claim is nothing more than a straightforward application of the terms of the WAP.

In addition, even if Plaintiff could show that a conflict of interest existed and affected the review of his claim, it would only mean that the Court would apply heightened scrutiny to the WAP Committee's decision rejecting his claim. *Abatie*, 458 F.3d at 968-9 (9th Cir. 2006) However, given the clear terms of the WAP regarding vesting and forfeiture, that decision must be upheld even under a *de novo* standard of review. Since the terms of the WAP permit only one conclusion, the existence of any alleged conflict of interest is immaterial.

D. Plaintiff's Forfeitures Were Consistent with the Terms of the WAP.

On pages 23 through 25 of his Opening Brief, Plaintiff argues that the WAP is "completely silent" on the issue of vesting with respect to termination without cause, and that this somehow renders the forfeiture of the unvested Company Contributions in Plaintiff's account "wrongful." Opening Brief at 24-25. Plaintiff contends that a critical issue in this case is whether "the WAP [Plan'] was set up so as to specifically preclude benefit vesting and distributions to employees, like Plaintiff, who are terminated without cause," asserting that the terms of the WAP are "completely silent on the vesting and distribution of an employee's benefits when such an employee is terminated without cause." Opening Brief at 1.

This argument is specious. The WAP Plan Document expressly provides that, subject only to certain specifically enumerated exceptions, "all Company Contributions and Mandatory Deferred Compensation that are not vested on the participant's employment termination date shall be deemed forfeited, and such

participant's account shall be appropriately reduced." [Sikich Decl., ¶ 8, Exh. G, p. 29 (2007 WAP Plan Document § 4.5).] Those exceptions are (i) termination on account of death, disability or retirement, (ii) termination for cause, and (iii) termination due to restructuring. [Sikich Dec. ¶ 8, Ex. G, p. 28-29 (2007 WAP Plan Document §§ 4.2 (i) (ii)) & 4.4).] While the terms of the WAP impose more stringent provisions regarding vesting in situations in which the participant's termination is for cause, the general rule is that unvested Company Contributions are forfeited in the event of termination. [Sikich Decl., ¶ 8, Exh. G, p. 29 (2007 WAP Plan Document § 4.5).] The undisputed facts in this case are that the unvested Company Contributions in Plaintiff's account were forfeited in accordance with the terms of the WAP upon his termination. Plaintiff's claim for a distribution of those amounts therefore fails as a matter of law.

Plaintiff's quotation of the relevant terms of the WAP is inaccurate in the extreme. At pages 7 and 8 of his Opening Brief, Plaintiff includes a long block quotation not from the WAP plan document in effect at the time he presented his claim for benefits, but a Summary Description and Prospectus from 2003.[4] Even setting aside whether this document is properly part of the administrative record, it does far more to support Defendants' position than Plaintiff's. Indeed, Plaintiff has so altered and misquoted the text as to create the impression that it supports his position when, in fact, it refutes it. While the first paragraph of the block quotation accurately repeats the text of the document, the very next paragraph of the text has been omitted without any ellipses in the block quotation to signal its omission. That paragraph, moreover, directly contradicts the argument for which Plaintiff cites the document, stating:

[4] The relevant document is attached to Plaintiff's Amended Supplement To The Administrative Record, filed on July 31, 2009. Plaintiff cites this document as "SAA 62," which, he explains refers to the page bearing bates-stamp no. 62 in the "Plaintiff's Supplement to the Administrative Record." *See* Opening Brief at p. 4:23-26 (footnote 6).

> **Distributions that are made prior to the date on which Matching Contributions, Mandatory Deferred Compensation or Special Deferred Compensation are vested will, in general, result in the forfeiture of such contributions.**
>
> [Pl.'s Amended Suppl. To The Admin. Record, [dkt. # 37], filed July 31, 2009, at 00062 (2003 Summary Description and Prospectus p. 7).]

The next two paragraphs of the block quotation repeat some of the text of the following paragraph in the document, but again language has been added or omitted without proper use of ellipses or brackets to signal alterations. [*Compare* Opening Brief at 8:3-9 *with* Pl.'s Amended Suppl. To The Admin. Record, [dkt. # 37], filed July 31, 2009, at 00062 (2003 Summary Description and Prospectus p. 7).] Plaintiff's brazen misuse of this document is worthy of judicial admonition, if not sanction.

Plaintiff's citation to the distribution provisions of the WAP Plan Document is only slightly less misleading. At page 4 of his Opening Brief, Plaintiff points out that the WAP provides special rules for distribution upon separation. Opening Brief 4:3-8. What Plaintiff glosses over, however, is that it is the "Account Balance" which is subject to distribution. And Section 4.5 of the WAP provides in unambiguous language that "[e]xcept as otherwise specifically set forth herein, all Company Contributions . . . that are not vested on the participant's employment termination date shall be deemed forfeited, *and such participant's account shall be appropriately reduced.*" [Sikich Decl., ¶ 8, Exh. G , p. 29 (2007 WAP Plan Document § 4.5).] Thus, after termination, any unvested Company Contributions are no longer included in the "Account Balance" and the distribution provisions in Section 5 of the WAP have no bearing on the treatment of these forfeited amounts.

E. The Determination that Plaintiff's Termination Resulted from a Restructuring Benefitted Plaintiff.

At page 22 of his Opening Brief, Plaintiff attacks the fact that Plaintiff's termination was deemed by the Committee to have been the result of a restructuring.[5] Plaintiff points out that Section 4.4 of the 2007 WAP provides:

> In the event a participant ceases to be employed by the Company, any Participating Subsidiary and any other affiliate of the Company due to an organizational restructuring (as determined in the sole discretion of the Committee), all Mandatory Deferred Compensation in such participant's account shall become vested, but all unvested Company Contributions shall be forfeited.

[Sikich Dec. ¶ 8, Ex. G, p. 29 (2007 WAP Plan Document § 4.4).]

As Plaintiff notes, the Committee is vested with discretion to make the determination as to whether a participant's termination is the result of a restructuring. However Plaintiff has not shown that the Committee abused its discretion in characterizing the reduction in force which eliminated his position as a restructuring, only that he disagrees with that interpretation of the plan language. The relevant inquiry, however, is whether the Committee's interpretation was so unreasonable as to amount to an abuse of discretion. *Firestone*, 489 U.S. at 114-15. Short of that level, the Court must defer to the Committee's interpretation of the WAP Plan Document.

Moreover, even if Plaintiff were correct that section 4.4 does not apply to his termination, it would make no difference, since section 4.4 is more lenient than the general forfeiture provision in section 4.5. Under section 4.4, any Mandatory Deferred Compensation in his account would have vested (it would not have

[5] Plaintiff inaccurately states that there is no record that the WAP Committee actually met and considered his initial request for accelerated vesting which he presented in November 2007. In fact, the Committee considered and rejected the claim at its meeting on December 7, 2007, as reflected in the agenda of that meeting and the minutes entered subsequently. These documents are attached to the Sikich Declaration filed on July 22, 2009 as Exhibits K and L, respectively.

otherwise) and only Company Contributions would be forfeited. [Sikich Dec. ¶ 8, Ex. G, p. 29 (2007 WAP Plan Document § 4.4).] However, the only amounts remaining in Plaintiff's WAP account at the time of his termination were unvested Company Contributions, which are forfeited upon termination under both sections 4.4 and 4.5. Thus, whichever section governs, Plaintiff was not entitled to vesting of the amounts he seeks by this lawsuit.

F. The Absence of an Integration Clause is Irrelevant.

Finally, at page 25 of his Opening Brief, Plaintiff argues that the absence of an integration clause means that the terms of the WAP do not represent the entire agreement of the parties. Opening Brief at 25. This argument is absurd. The interpretation of the terms of the Plan is vested in sole discretionary authority of the WAP Committee. [Sikich Decl., ¶ 8, Exh. G, p. 34 (2007 WAP Plan Document § 7.1).] The ability to amend the terms of that document is expressly limited to action by either the Committee or the Board of Directors. Plaintiff provides no factual support for any potential modification of the terms of the WAP Plan documents with respect to his participation therein.

Moreover, the only support Plaintiff provides for his argument consists of two unreported decisions of the Ninth Circuit. Such citation is, of course, improper for the purpose for which Plaintiff offers these authorities. See 9th Cir. R. 36.3. Further, at least on of those relies on California law. See *Satchwell v. Long John Silvers, Inc.*, 1992 U.S. App. LEXIS 9519 *5 n.1 (9th Cir. April 9, 1992). Subject to certain exceptions not applicable in this case, Section 514(a) of ERISA provides that "the provisions of [Title I and Title IV of ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Plaintiff's reliance on a state-law contract theory to support his claim is contrary to the well-settled law in this area and should be rejected. Defendants are entitled to judgment as a matter of law on Plaintiff's claim for additional benefits under the WAP.

V. CONCLUSION

Plaintiff's Opening Brief focuses on irrelevant arguments attacking, generally, the WAP and its administration. Plaintiff fails to explain anywhere in his brief how these arguments relate to his claim for benefits under the Plan. This may be because he must acknowledge that under the clear language of the Plan, he is not entitled to the benefits he claims.

Based on the provisions of the WAP, and the Administrative Record, it is clear that the Committee did not abuse its discretion in denying Plaintiff's claim for benefits. Defendants are entitled to judgment as a matter of law.

DATED: August 5, 2009

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Linda Claxton
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVEN BENHAYON,

Plaintiff,

v.

ROYAL BANK OF CANADA, a Canadian company, business form unknown; RBC WEALTH MANAGEMENT COMPANY, formerly RBC DAIN RAUSCHER, INC., business form unknown; THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN, formerly known as RBC Dain Rauscher Wealth Accumulation Plan; and, DOES 1 through 20,

Defendants.

Case No. CV08-06090 FMC(AGRx)

DEFENDANTS' SUPPLEMENTAL REPLY BRIEF REGARDING PLAINTIFF'S CLAIM FOR BENEFITS UNDER THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN

DJ: Florence-Marie Cooper
Courtroom: (Roybal) 750
MJ: Alicia G. Rosenberg
Courtroom: (Spring) 23

Discovery Cut-Off: September 30, 2009
Pre-trial Conference: January 25, 2010
Trial: February 16, 2010

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TABLE OF AUTHORITIES

I. PRELIMINARY STATEMENT

In accordance with this Court's August 10, 2009 Order On Plaintiff's Ex Parte Application And Amended Briefing Schedule, Defendants Royal Bank of Canada, RBC Capital Markets Corporation (incorrectly named and sued as "RBC Wealth Management Company, formerly RBC Dain Rauscher, Inc.."), and The Royal Bank of Canada US Wealth Accumulation Plan (collectively "Defendants") hereby submit their Supplemental Reply Brief in support of their Motion for Partial Summary Judgment On Plaintiff's Claim For Benefits Under The Royal Bank of Canada US Wealth Accumulation Plan (the "Motion").

Defendants previously filed a reply brief in support the Motion on August 5, 2009. After that brief was filed, this Court issued its August 10, 2009 Order, which amended the briefing schedule for the ERISA portion of the case and provided that Defendants' reply brief would be due September 28, 2009, rather than August 5, 2009, as previously set by the Court.

Defendants' reply brief filed on August 5, 2009 addresses those matters raised in Plaintiff's Opening Brief filed on July 22, 2009. To avoid needlessly expanding the record, this brief will be limited to addressing developments in this litigation since that brief was filed which may be relevant to the Court's decision on the Motion. Defendants respectfully refer the Court to their prior submissions in support of the Motion for all matters not addressed herein.

II. DEFENDANTS' STYLED THEIR OPENING BRIEF AS A MOTION FOR SUMMARY JUDGMENT OUT OF AN ABUNDANCE OF CAUTION AND TO AVOID ANY PREJUDICE TO PLAINTIFF.

After Defendants filed their reply brief, this Court issued its August 10, 2009 Order stating that Defendants had ignored the Court's May 4, 2009 Minute Order by filing a motion for summary judgment rather than an Opening Brief on the question of ERISA benefits. Defendants never intended to disregard this Court's directions and were in fact attempting to comply with those directions in good faith. Based on the May 4, 2009 Minute Order, Defendants understood that the Court had requested

briefing from the parties which would resolve "the ERISA portion of the case." Defendants further believed that, if that portion of the case were resolved in their favor, they would be entitled to judgment on Plaintiff's claim for benefits under the Royal Bank of Canada U.S. Wealth Accumulation Plan (the "WAP") and wished to make an affirmative request for such relief. Arguably then, Defendants' opening brief would be, in substance, a dispositive motion regarding that claim to which the requirements of Federal Rule of Civil Procedure 56 and Local Rules 56-1 through 56-4 might conceivably apply. Hence, out of an abundance of caution, and to avoid any possible waiver of its right to judgment should the Court resolve the ERISA portion of the case in its favor, Defendants styled their opening brief as a motion for partial summary judgment and submitted the supporting documents required for the Court to rule on such a motion.

Defendants viewed this approach as a conservative one which could not possibly prejudice Plaintiff. Styling their opening brief as a motion for partial summary judgment would not require Plaintiff to meet any unanticipated legal issues or evidence, since the Court had already announced that these briefs would fully resolve the merits of Plaintiff's claim for benefits under the WAP. Moreover, given that these briefs were intended to resolve the ERISA portion of the case, Plaintiff was already required to make the necessary showing to prevail on the merits, which is more than the showing that would be required to defeat a motion for summary judgment. Additionally, since Plaintiff had already enjoyed more than four months to conduct discovery, he had more than sufficient opportunity to develop whatever evidence he felt he needed to make this showing. Finally, the stipulated briefing schedule allowed Plaintiff two weeks to prepare his responsive brief, more than the time provided under the Federal Rules of Civil Procedure or the Local Rules of this Court to oppose a motion for summary judgment. Consequently, a motion for partial summary judgment would not impose any burdens on Plaintiff that he was not already required to meet and he would not be unduly prejudiced if Defendants

proceeded in this manner.

Based on the Court's August 10, 2009 Order, Defendants now understand that the Court wished to resolve the ERISA portion of the case by way of briefing, but without resort to the usual procedures for obtaining summary judgment. Defendants apologize for any confusion they have created by their earlier misunderstanding and have complied with the provisions of that Order. Moreover, Defendants have no objection should the Court wish to conduct a court trial of Plaintiff's claim for benefits under the WAP based on the existing court record, in the manner provided in *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1094-95 (9th Cir. 1999).

III. THE FURTHER DISCOVERY CONDUCTED BY PLAINTIFF AFTER THIS COURT'S AUGUST 10, 2009 ORDER DOES NOT AFFECT THE COURT'S RULING ON THE ERISA PORTION OF THE CASE.

In its August 10, 2009 Order, this Court granted Plaintiff leave to take the deposition of Gabriela Sikich. Defendants complied and the deposition was completed on August 28, 2009. At the deposition, Defendants also produced 290 pages of documents at the deposition, in response to various Requests for Production included with the Notice of Deposition. During this period, Defendants also responded to Plaintiff's Special Interrogatories (Set Two) and provided Plaintiff with unredacted versions of 43 pages previously produced in redacted form. No other discovery has taken place since the Court issued its August 10, 2009 Order.

While Plaintiff may offer some of the testimony, documents and/or responses obtained from this discovery for the Court's consideration, none of it has any bearing on the issues the Court must decide at this juncture. The ERISA portion of this case is a straight-forward claim by Plaintiff that he was improperly denied benefits under the WAP, which both sides have agreed to treat as a pension plan subject to ERISA for purposes of this Motion. Whether an employee is entitled to benefits under an ERISA plan "stands or falls by the terms of the plan." *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan,* ___ U.S. ____129 S.Ct. 865, 875 (2009) (internal quotation marks and citation omitted). Thus, if the provisions of the WAP are

unambiguous, which they are, then Plaintiff's claim must be rejected, and any argument that those terms are somehow unreasonable or were set up "in bad faith" is simply irrelevant. *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 149 (2d. Cir. 1999) ("As a general matter, unambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning"); *Carr v. First Nationwide Bank*, 816 F.Supp. 1476, 1493 (N.D.Cal.,1993 (where plan language is unambiguous, its natural meaning is conclusive). Specifically, any appeal to fiduciary duties misses the mark, since an ERISA plan administrator is bound to pay benefits in accordance with the terms of the plan, and any departure from those terms would constitute a breach the administrator's statutory duties. *Kennedy*, ___ U.S. ____,129 S.Ct. at 875. Hence, to adjudicate Plaintiff's claim, this Court need only review the terms of the WAP plan document (specifically Section 4), which is already in evidence, and apply them to the undisputed facts concerning the date of Plaintiff's termination and the vested status of his WAP benefits on that date. Any further evidence Plaintiff may offer cannot change the clear result that the benefits he seeks were forfeited because his employment with Defendants ended before those benefits vested.

Any further evidence Plaintiff may offer is unavailing even if the Court finds that the relevant terms of the WAP are ambiguous or that factual determinations are required before those terms can be applied to Plaintiff's circumstances. Since the WAP confers discretion on the WAP Committee to administer claims – a point Plaintiff does not dispute – its decision on these matters is reviewable in court only for an abuse of discretion. *Abatie v. Alta Life & Health Ins. Co.*, 458 F.3d 955, 965 (9th Cir. 2006). Such review, moreover, is limited to the administrative record which the plan administrator had before it at the time the decision was made. *Id.* at 970. That record has already been introduced into evidence and authenticated, and nothing obtained in subsequent discovery alters its scope. Thus, any additional evidence Plaintiff may offer in connection with his reply brief would be evidence

that was not part of the administrative record, which this Court cannot consider to determine Plaintiff's entitlement to the benefit he seeks. *Id.*

Nor can Plaintiff escape the bar on evidence outside the administrative record by suggesting that the evidence he has obtained is somehow relevant to demonstrate that the WAP Committee acted under a conflict of interest. While a court may consider evidence outside the administrative record for this limited purpose, *see id.*, the goal of such inquiry is only to determine "the degree to which the conflict appears improperly to have influenced a plan administrator's decision." *Montour v. Hartford Life & Accident Ins. Co.*, ___ F.3d ___, 2009 WL 2914516 at *5. Here, however, there is no evidence of any such improper influence. To the contrary, Ms. Sikich testified both in her declaration submitted with Defendants' reply papers and at deposition that none of the members of the WAP Committee responsible for deciding Plaintiff's entitlement to benefits under the WAP (i) were employed by the entity responsible for paying those benefits, or (ii) were aware of the financial consequences of their decision. (Second Decl. of G. Sikich In Support Of Defendants' Motion for Partial Summary Judgment [dkt. # 39-2] at 2:4-13; Sikich Depo.[1] at 45:17-47:22, 59:9-60:20 & 61:24-63:7.) Discovery, moreover, has not revealed any evidence that these decision-makers failed to follow established procedures in considering Plaintiff's claim, disregarded or downplayed materials submitted by Plaintiff, or gave undue weight to opposing evidence. Thus, there are no facts or circumstances suggesting that a conflict of interest tainted the administrative decision-making process and no reason to conclude that an abuse of discretion occurred.

Finally, any further evidence Plaintiff may offer pertaining to the WAP's top-hat status is irrelevant since the same framework applies to the judicial review of a claim for benefits "for all covered plans, top hat or otherwise." *Sznewajs v. U.S.*

[1] The relevant excerpts of the Deposition of Gabriela Sikich are attached as Exhbit A to the Second Declaration of Christopher W. Decker In Support Of Defendants' Motion For Partial Summary Judgment, filed concurrently herewith.

Bancorp Amended and Restated Supplemental Benefits Plan, 572 F.3d 727, 734 (9th Cir. 2009). Specifically, a participant's entitlement to benefits is determined solely by the terms of the plan document and the plan administrator's decision is reviewable only for an abuse of discretion. *Id.* at passim. Indeed, the only difference between the two types of plans which Plaintiff has suggested may affect the outcome of this litigation is that the administrators of ERISA plans (other than top-hat plans) are subject to ERISA fiduciary duty rules. However, as explained above, that difference is immaterial here, since, in reviewing a claim for benefits, ERISA plan administrators must exercise their fiduciary duties *in accordance with the terms of the plan document*. *See, e.g., Kennedy*, ___ U.S. ____,129 S.Ct. at 875. Accordingly, in this instance, the analysis of Plaintiff's claim for benefits is the same regardless of whether the WAP is a top-hat plan or not, and the Court need not even resolve whether the WAP falls within the top-hat plan exemption.

IV. THE COURT SHOULD DISREGARD PLAINTIFF'S OBJECTIONS TO THE SECOND DECLARATION OF GABRIELA SIKICH.

The Court's briefing schedule for the ERISA portion of the case provided that the parties would submit *simultaneous* opening and reply briefs, which necessarily forecloses either side from responding to the other's second submission. Nonetheless, after Defendants filed their reply papers on August 5, 2009, which included the Second Declaration of Gabriela Sikich In Support Of Defendant's Motion For Partial Summary Judgment, Plaintiff filed evidentiary objections to that declaration. This Court should disregard the objections since they exceed the scope of the briefing requested by the Court.

In any event, Plaintiff's objections are without merit. Plaintiff objects that Ms. Sikich is "wholly unqualified to render any testimony as to the administration, management, or operation of the WAP Committee" because she is not a member of that committee. (Pl.'s Obj. to Second Decl. of G. Sikich [dkt. # 41] at 2:14-2:28.] However, Ms. Sikich does not testify to any of these matters in her Second

Declaration, but only provides information regarding the percentage of Defendants' workforce eligible to participate in the WAP, the average compensation of those eligible to participate and Defendant's workforce generally, and the membership of the WAP Committee. She further testifies in her declaration that this information is based on her own personal knowledge or her review of Defendants' business records, establishing the necessary foundation for that testimony and an exception to the hearsay rule. (Second Decl. of G. Sikich [dkt. # 39-2] at 1:5-8.)

Plaintiff further objects to paragraphs 6-8 of the Ms. Sikich's Second Declaration on the grounds that her testimony regarding the contents of Defendants' business records constitutes hearsay, violates the best evidence rule and is given without adequate personal knowledge. However, Ms. Sikich is not attempting to establish the contents of those records, but is rather relying on them to establish certain facts regarding the percentage of employees eligible to participate in the WAP, their average compensation, and the average compensation of Defendants' workforce generally. Since those business records qualify for an exception to the hearsay rule, Ms. Sikich may rely on them to establish the facts which they describe. Her personal knowledge of the contents of these records is provided by her own testimony in the declaration. (Second Decl. of G. Sikich [dkt. # 39-2] at 1:12-18.)

Finally, Plaintiff objects that Ms. Sikich's Second Declaration improperly introduces new evidence not presented at the time of Defendant's opening brief. However, the facts in Ms. Sikich's Second Declaration respond directly to the arguments advanced by Plaintiff in his opening brief, specifically that (i) the WAP is not a top-hat plan because participation is not limited to a select group of management or highly compensated employees, and (ii) the members of the WAP Committee who decided Plaintiff's claim for benefits had a financial incentive to deny that claim. Accordingly, the declaration is proper as a rebuttal of the evidence offered by Plaintiff in connection with his opening brief.

V. CONCURRENTLY HEREWITH, DEFENDANTS ARE FILING AN AMENDED SECOND DECLARATION OF GABRIELA SIKICH TO CORRECT A COMPUTATIONAL ERROR IN THE DOCUMENT PREVIOUSLY FILED WITH THE COURT.

After completing their filing on August 5, 2009, Defendants became aware that the Second Declaration of Gabriela Sikich filed concurrently with Defendants' reply papers contained a computational error. Specifically, the average annual compensation of WAP-eligible employees in WAP plan years 2003 through 2007 had been understated. The corrected numbers are provided in the Amended Second Declaration of Gabriela Sikich In Support Of Defendants' Motion For Partial Summary Judgment On Plaintiff's Claim For Benefits Under The Royal Bank Of Canada U.S. Wealth Accumulation Plan, which is being filed concurrently herewith.

In its reply papers, Defendants relied on the incorrect data only to support their argument that WAP participants qualify as "highly-compensated employees" because they earn at least twice the average for Defendants' employees generally and in excess of $100,000 per year. (Defs.' Reply Memo. [dkt. # 39] at 5:17-6:9.) Since this is all the more true based on the corrected data, the error in the data previously provided is not material.

Defendants served the Amended Second Declaration of Gabriela Sikich on Plaintiff on August 25, 2009, in advance of the deposition of Ms. Sikich. (See Amended Second Declaration of G. Sikich, filed concurrently herewith, at 2.) Thus, Plaintiff has had a full opportunity to inspect the amended declaration and examine Ms. Sikich regarding its contents. Consequently, Plaintiff has not been prejudiced by the error or subsequent correction.

VI. CONCLUSION

For all foregoing reasons, in addition to those set forth in the papers previously filed by Defendants on July 22, 2009 and August 5, 2009, this Court should adjudicate Plaintiff's claim for benefits under the WAP in favor of Defendants and enter judgment accordingly.

DATED: September 28, 2009

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Christopher W. Decker
Christopher W. Decker
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVEN BENHAYON,

Plaintiff,

v.

ROYAL BANK OF CANADA, a Canadian company, business form unknown; RBC WEALTH MANAGEMENT COMPANY, formerly RBC DAIN RAUSCHER, INC., business form unknown; THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN, formerly known as RBC Dain Rauscher Wealth Accumulation Plan; and, DOES 1 through 20,

Defendants.

Case No. CV08-06090 FMC(AGRx)

SECOND DECLARATION OF GABRIELA SIKICH IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR BENEFITS UNDER THE ROYAL BANK OF CANADA US WEALTH ACCUMULATION PLAN

DJ: Florence-Marie Cooper
Courtroom: (Roybal) 750
MJ: Alicia G. Rosenberg
Courtroom: (Spring) 23

Trial Date: February 16, 2010

DECLARATION OF GABRIELA SIKICH

GABRIELA SIKICH declares:

1. I am the US Defined Contribution Plan Manager for RBC Capital Markets Corporation, a defendant in this action.

2. The facts stated in this declaration are true of my own knowledge or my review of the business records of the Royal Bank of Canada and/or its subsidiaries.

3. If called as a witness, I could and would competently testify as to the truthfulness of the facts contained herein.

4. From at least 2002 to the present, the Royal Bank of Canada has sponsored the Royal Bank of Canada US Wealth Accumulation Plan ("the WAP Plan").

5. I am familiar with and have access to business records regarding the terms of the WAP, eligibility requirements for various employees to participate in the WAP, the number of employees who were eligible to participate in the WAP, and the election of certain benefits under the WAP. I also have access to business records reflecting the compensation earned by various employees of WAP-participating entities (which, at present, are RBC Capital Markets Corporation, RBC Bank, and RBC Insurance).

6. Only a small percentage of the employees of WAP-participating entities are eligible to participate in the WAP. In 2003, only 7.11% of those employees were WAP-eligible. In 2004, only 13.08% of those employees were WAP-eligible. In 2005, only 13.06% of those employees were WAP-eligible. In 2006, only 14.40% of those employees were WAP-eligible. And in 2007, only 14.91% of those employees were WAP-eligible.

7. The average annual compensation of WAP-eligible employees in WAP plan years 2003 through 2007 was as follows: $269,156 in 2003; $310,908 in 2004; $315,494 in 2005; $327,348 in 2006; and $345,030 in 2007.

8. The average annual compensation of the workforce of all

WAP participating entities in Plan years 2003 through 2007 was as follows: $75,132 in 2003; $79,758 in 2004; $83,900 in 2005; $104,603 in 2006; and $106,416 in 2007.

9. I am familiar with the membership of the WAP Committee during calendar years 2007 and 2008. The members of the WAP Committee present at the December 7, 2007 meeting, and who participated in the consideration of the Mr. Benhayon's request for accelerated vesting (following which the request was denied) were: Dan Szabo, Mary Zimmer, Jim Chapman, and Lisa Sorenson. The same four individuals were also the members of the WAP Committee present at the April 8, 2008 meeting, and who participated in the consideration of the Mr. Benhayon's appeal of his denied request (following which the appeal was denied). None of these four individuals is employed by the Royal Bank of Canada. All are employed by an entity distinct from the Royal Bank of Canada.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 5th day of August 2009 at Minneapolis, Minnesota.

Gabriela Sikich